

Alexander *Earl of Home*, Charles *Earl of Tankerville*, and others, } Appellants.

John *Duke of Roxburgh*, and others, } Respondents.

The Appellants C A S E.

THE *Earls of Home and Tankerville* are possessed of considerable Estates on the Banks of the *Tweed*. The *Earl of Home's* Estate lies on the North, and the *Earl of Tankerville's* on the South-Side of the River, which is at that Place the Boundary between the Two Kingdoms. Both of them are seised of Salmon Fishings in that River, by virtue of Grants from the Crowns of *Scotland and England*. The Method practised in carrying on this Fishing, for Time immemorial, has been by a Dyke or Bulwark across the Channel of the River, built and supported at their joint Expence; and in which, besides a large Opening towards the South or *English* End of the Dyke, which has always been left free, there likewise have been Five Holes or Openings in it, Two towards the *English*, and Three towards the *Scots* Side; and in which Holes or Openings Nets are placed, during the Fishing Season, to catch the Salmon that chance to come up to them; and for the same Purpose of catching the Salmon, a small Barricade of Stones is laid a little below the Dyke, and what are called Black Nets are placed in Openings therein, which do not hinder the Fish from entering the Space between the Barricade and the Dyke, but prevents them from returning down or getting out of it by the same Openings.—This Dyke has likewise immemorially served the Purpose of turning the Water into the Mill-Lead or Aqueduct of *Fairburn-Mill*, belonging to the Appellant the *Earl of Home*.

In 1762, the Respondents brought an Action in the Court of Session against the Appellants, founded upon an Act made by the Parliament of *Scotland* in 1696, for regulating Salmon Fishings within that Kingdom, and praying that the Mode of Fishing exercised by the Appellants should be subject to the Regulations prescribed by that Act.—After several Proceedings in that Action, which are fully stated in the Cases respecting that Matter now before your Lordships, and appointed to be determined at the same Time with this present Appeal, the Court pronounced the following Judgment: “The Lords, on Report of the Lord *Kennet* Ordinary, and having advised the Petition for the *Earl of Home*, with “Answers thereto for the *Duke of Roxburgh*, as also the Memorial for the *Earl of Tankerville* and his Attorney, and for “the *Duke of Roxburgh*, find, That in the special Circumstances of this Case the Act of Parliament 1696 does not extend to the Fishing in Question, and remit to the Lord Ordinary to proceed accordingly:” And upon a Reclaiming Petition for the Respondent, the Court adhered to this Judgment.

Thus Matters rested between the Parties till the Year 1771, when another Action was brought before the Sheriff of *Berwickshire*, in the Name of *Thomas Lillie*, and others, Lessees of Salmon Fishings on the superior Part of the River *Tweed*, against *William Turner*, the *Earl of Home's* Lessee of *Fairburn Mill*, and of his Fishing in the River *Tweed* there, in which Action the *Duke of Roxburgh* and the other Proprietors of these Fishings, soon thereafter stated themselves as Plaintiffs.—The Declaration sets forth, That by an Act passed in the last Session of the present Parliament of *Great Britain*, intituled, “An Act for regulating and improving the Fisheries in the River *Tweed*, and Rivers and Streams running into the same; “and also within the Mouth or Entrance of the said River”—It was enacted, That if from and after the 12th *May*, 1771, any Person or Persons shall beat the Water or Place, or set any white Object, or any other Thing whatever in the said River *Tweed*, or in, over or cross the said River, &c. in order to prevent the said Fish from entering the said River *Tweed*, or from going up or down the said River, &c. Every Person so offending, shall for every Offence forfeit any Sum not exceeding Five Pounds, nor less than Ten Shillings, to be levied and recovered as directed by the said Act. That nevertheless, the Defendant had contravened the said Act in so far as upon the 13th of *May* then last, and upon each of the subsequent Days of that Month he had made use of sundry illegal Engines placed in and about the Caul or Mill-Dam-Dyke of *Fairburn Mill* for fishing the Salmon in the said River, and preventing them from going up and down the River in the Way and Manner therein set forth, viz. By using Five Holes in the Dyke with Nets and Barricades; and that the said Dam-Dyke is so high above the Surface of the River, that no Fish can pass or repass over it unless when the River is in Flood; and therefore concluding, that the Defendant should be fined in the Sum of Five Pounds Sterling, as forfeited to the Plaintiffs for each Day of his having contravened the said Act of Parliament in Manner foresaid; and also that he should be ordained to remove the said illegal Engines, and all other Things in and about the said Caul that any way hinder or obstruct the Passage of the Salmon up and down the said River of *Tweed*, or otherways that the same should be removed or demolished by Authority of the Sheriff.

The Defendant answered, That nothing in the abovementioned Statute did or could affect the Fishing in Question. The Sheriff however repelled this Defence, and allowed the Plaintiffs to prove their Declaration.

The Appellants, the *Earls of Home and Tankerville*, were at this Time apprised of these Proceedings, and conceived it necessary for them to appear in the Suit to protect their Property; for this Purpose they applied to the Court of Sessions by a Bill of Advocation, of the Nature of a *Certiorari*. The Plaintiffs put in their Answer; in which, waving the Merits of their Cause, they insisted solely, That the Statute had given an exclusive Jurisdiction to the Sheriff to try all Offences under it, subject only to an Appeal to the Circuit Courts of Justiciary. Upon this Ground alone the Lord Ordinary was pleased to refuse this Bill; whereupon the Appellants presented a second Bill, in which the Merits were more fully stated. The Respondents put in their Answer, and the Lord Ordinary took the Point to report to the whole Court.

Both Parties having afterward agreed to submit themselves to the Jurisdiction, and abide by the Determination of the Court of Session, Memorials were given in upon the Merits of the Question itself, and the Import of the Statute 1771.

The Respondents, who were the original Plaintiffs in the Action, by their Memorial insisted,

That the Engines and Mode of Fishing, exercised by the Appellants at their Dam-Dyke, having the direct Consequence of preventing the Salmon from going up and down the River, the same fell directly within the enacting Words of the Statute 1771: That the permitting the free Passage of Salmon up and down Rivers being grounded on public Policy, on Purpose that the Use of Salmon, while fresh, may become more general by being caught in different Parts of the River; therefore this Statute, which was meant to effect that Purpose, merited the most liberal Construction.

The Appellants, in their Memorial, pleaded,

That the Respondents had laid their Action improperly; they founded solely upon the Statute 1771, which enacts only Penalties, yet the Respondents, by their Action, prayed, that the Dam-Dyke should be taken down and demolished.

The Appellants maintained, That whatever may have been the Views and Intention of some of the Parties in applying for this Act of Parliament, yet that nothing therein contained did extend or could be construed to affect the Mode of Fishing exercised by the Appellants at this Dam-Dyke.—The Right of Fishing itself is admitted, and the antient Mode of carrying it on established.—The Legislature therefore could not, in natural Justice, deprive the Appellants of their Property, without an adequate Consideration; for though it often happens, that private Interest must yield to public Benefit, yet, in such Cases, a suitable Recompence is always decreed to the private Party.

The Statute upon which the present Action is founded, in its Title, Preamble, and through the whole enacting Clauses, proves its avowed as well as real Purpose, which is the most distant from affecting or extending to the Mode of Fishing exercised by the Appellants.—The Title runs, That it is an Act “for regulating and improving the Fisheries in the River Tweed;” and the Preamble corresponding to this Title sets forth, “Whereas Salmon Gills, Salmon Trouts, and Whitlings, and the Spawn or Fry thereof, are frequently killed, taken, or destroyed, at improper Seasons, in the River Tweed, and the Rivers and Streams which run into the same, as also within the Mouth or Entrance of the said River, to the great Detriment of the Owners and Occupiers of the Fisheries, and Loss to the Public; for Remedy whereof, and for the Improvement of the Fisheries in the said Rivers, be it enacted,” &c.

The Statute then proceeds, and enacts, “That from and after the Twelfth Day of May, 1771, if any Person or Persons shall take or kill any Salmon, Gills, Salmon Trout, or Whitling; or take, kill, or destroy the Spawn, Fry, or young Brood of any such Fish in the said River Tweed, or in any Rivulet, &c. communicating with the same, or within the Mouth or Entrance of the said River Tweed, at any Time between the Tenth Day of October and Tenth Day of January, or between Ten o’ Clock on Saturday Night, and Two o’ Clock on Monday Morning, every such Person shall forfeit and pay,” &c. This Clause therefore respects only the Fishing at improper Seasons; and if any particular Mode of Fishing practised upon this River, had been deemed such a Grievance as the Respondents now endeavour to make out, it cannot be doubted but the same would have been prohibited in Words clear and unambiguous.

The second Clause in the Act describes what shall be deemed the Mouth of the River, and is not material to the present Question.

The third Clause prohibits, under a Penalty, every Person, from and after the Twelfth of May, 1771, “to place, lay, set, continue, or draw, any Net, Creel, Hamper, Engine, or other Device whatsoever, in the said River Tweed, or in any River, Rivulet, Brook, or Stream, or in any Mill-pool, Mill-lead, Sluice, or Cut, which communicates with the said River Tweed, or within the Mouth or Entrance thereof, in order to kill or take any Spawn, Fry, or young Brood of any Salmon Gills, Salmon Trout, or Whitling; or to take, kill, or destroy, or have in their Custody or Possession, any Spawn, Fry, or young Brood of any such Fish as aforesaid, between the First Day of April and the First Day of June, under the Penalty therein mentioned.”

This Clause is likewise intended for the Preservation of the young Brood of Salmon, at a Period different from that mentioned in the former.

The Respondents principally rely upon the next Clause, which is in the following Words.

“And be it further enacted, That from and after the said Twelfth Day of May, 1771, if any Person or Persons shall beat the water, or place or set any white Object, or any other Thing whatsoever, in the said River Tweed, or in any River, Rivulet, Brook, Stream, Mill-pool, Mill-lead, Sluice, or Cut, which communicates with the said River Tweed, or in the Mouth or Entrance of the said River Tweed, in order to prevent the said Fish from entering the said River Tweed, or from going up and down the said River or any River, Rivulet, Brook, Stream, Mill-pool, Mill-lead, Sluice, or Cut aforesaid, or shall by any other Ways, or in any other Manner, prevent the Fish from entering the said River, and going up and down the said Rivers and Waters before described: Every Person so offending shall, for every Offence, forfeit any Sum not exceeding Five Pounds, nor less than Ten Shillings.”

The Act contains the following Proviso, “That nothing herein contained shall in any ways prejudice or affect the Right of the Owners or Proprietors of Fisheries, or the Right of any other Person or Persons, who now are or at any Time hereafter shall or may be seised, possessed of, or entitled to any Manors, Seigniories, or Royalties within the Mouth or Entrance of the said River Tweed, as the same is herein before described; but that all and every such Owners and Proprietors and other Person or Persons as last are mentioned, shall have and enjoy all such Right of Fishery within the said Mouth or Entrance of the said River Tweed as they have hitherto lawfully exercised or enjoyed, or could or might have lawfully exercised or enjoyed in case this Act had not been made (so as such Right be used and exercised at such Times and Seasons only, under such Regulations, and subject to such Penalties and Forfeitures as are herein before directed concerning the Fisheries within the said River Tweed, and within the Mouth or Entrance thereof) any Thing in this Act contained to the contrary in any wise notwithstanding.”

The Appellants maintained, That this Act neither prescribes nor prohibits any particular Mode of fishing in this River, or any Species of Engines or Instruments for taking and killing the Fish.—The Fishings of this River were subjected to no Regulations when this Act passed, and it being totally silent as to these, it must be understood that every Proprietor is left to employ every Mode and every Engine which he could lawfully use before this Statute.—The Clause above-recited, on which the Respondents rely, does not relate to any Mode of Fishing, or Engines for Fishing; and therefore cannot be held as a Prohibition of the Mode of Fishing in Question.—It respects only Devices that had been before practised for frightening the Salmon from entering the Mouth of the River, or passing up and down the same.—This is plainly the Meaning of the Prohibition against beating the Water, or placing any white Object, or doing any other Thing in order to prevent the Fish from going up or down the River.—It had been a frequent Practice to place stretched Cords, stuck full of white Feathers, running across the River, which continued waving and moving, and prevented the Salmon, being a timorous Fish, from approaching those Parts of the River where these waving Feathers were placed.—These were with Reason deemed unlawful Devices, their sole Purpose being to frighten and keep back the Salmon, by which Means they fell a Prey to those whose Engines or Nets in the lower Part of the River they had escaped.

The Respondents will not seriously say, that the Dam-Dyke, Pock-Nets, &c. used by the Appellants in this Fishing, are Engines placed by them merely to prevent the Fish from going up or down the River: The sole and immediate Purpose of them is, for the taking or killing the Fish.—They are Engines which the Appellants lawfully used before the Act, and which they must be equally entitled to use after it, as the Act does not prohibit any Engine whatever that was used for the Purpose of taking the Fish at proper Seasons.

Were the Clause capable of receiving such a Construction as the Respondents now contend for, it would involve the Statute in the highest Absurdity; as every fixed Engine and every Net that is used for taking the Fish would by the same Construction be prohibited and discharged, each of these having a Tendency in a greater or lesser Degree to frighten and interrupt the Salmon in their Passage up and down the River; which therefore demonstrates, that the Clause could never be meant or intended to affect the different Modes of Fishing, and solely respects Engines used and invented merely for obstructing the Passage of the Fish.

The Statute has no Relation to Engines of any Kind erected, fixed and established before the Act, but such only as should be erected or set up after the 12th Day of May, 1771; far less could it mean to order the Destruction of a Fishery, which, in all Probability, had stood some Hundreds of Years in the same Shape it now does, without Challenge or Objection, though the superior Proprietors are not more hurt by it now than they were at any former Period.

It is manifest that the Legislature did not intend to prohibit entirely the Use of all fixed Engines, Nets, &c. for the Clause immediately preceeding that upon which the Respondents rely, enacts, That if any Person, from and after the 12th of May, 1771, shall place, lay, set, continue or draw any Nets, Creel, Hamper, Engine, or any other Device whatever in the said River Tweed, &c. in order to kill or take any Spawn, Fry, or young Brood of any Salmon, &c. or shall take, kill, or destroy the same between the 1st of April and the 1st June; every such Person shall forfeit the Sum of Ten Shillings, &c. From which it appears that the Legislature had immediately under its View, Engines of various Sorts for the Purpose



Purpose of taking or killing Fish in this River, and particularly the using such Engines at Mill Dams, Sluices, &c. when the Prohibition goes no further than the Use of these Engines for killing young Fry only, and that only at a particular Time, it certainly allowed the free Use of them for killing Fish at all other Times and Seasons.

And as it thus appears that the Clause founded on by the Respondents was neither intended by the Legislature to import, nor can with any Justice or Propriety be understood to imply a Prohibition of that Mode of Fishing that had been lawfully used by the Appellants and their Predecessors for Ages past, and which is the only Mode practicable in that Part of the River; were the Clause of more doubtful Meaning than it truly is, every Construction which the Words can bear, favourable to the Appellants, will fall to be adopted for the Preservation of this their antient Property.

The Appellants further argued, That it is not by general Clauses of doubtful Meaning that any Person can be deprived of his Property, or the lawful Exercise of it; wherever the public Good requires this to be done, the Purpose is effected by a positive Enactment in the clearest and plainest Words, making, at the same Time, Provision for an Indemnification to the Party.—Had any Thing been expressed in this Act which could be understood to affect the Appellants Fishing; of which they, and their Ancestors, had been legally seized for Ages past, and their Rights protected by the Judgments of the Court of Session in 1768, it is impossible to believe that the Appellant, the Earl of Tankerville, sitting as a Member in one of the Houses of Parliament, would have permitted this Act to pass without attempting to preserve his Property.

The Respondents have alledged, that this Act was obtained for the special Purpose of regulating this Fishing at the Appellants Dam-Dyke, and to remedy in future the Loss which the superior Proprietors sustained thereby.

In their Pleadings before the Sheriff the Respondents stated, “That by the Interlocutor of the Court of Session, in 1768, the said former Action came to an End, in a Way unexpected to all the Proprietors of the Fishings in the said River, both below and above Fairburn-Mill-Caul, who before that Period believed, that there was not a Spot in Great Britain which did not fall under the Laws of the Land; but extraordinary Events and Losses puts the Sufferers to the Necessity of doubling their Diligence to find out proper Remedies, and this occasioned the Proprietors of the different Fishings in the River, by far the most valuable of any in Great Britain, being let at about 8000*l.* of yearly Rent, to apply to Parliament for Redress. The Statute, which is now the Foundation of this Action, was obtained, and still they are likely to be disappointed by the Defendants (*i. e.* Appellants) Efforts, which obliged the Pursuers (*i. e.* Respondents) to seek the Interposition of the Court for putting the same in Execution.”

If this Allegation is true, it requires this further Explanation: For what Reason, and upon what Account, no Mention is made of this Dam-Dyke and Fishery in the Act itself?—Had the Purpose of the Statute been as stated by the Respondents, it would have contained an express Clause respecting this Dam-Dyke and Fishery; but as it contains nothing respecting either, nor any general Prohibition of Fishing at Dam-Dykes during the proper Season, this affords demonstrative Evidence, that whatever Pretences may be now set up, this Statute was not meant or understood to affect this particular Fishery, or the Mode in which it has been exercised for Centuries past.

The Court pronounced this Interlocutor: “Upon Report of Lord Gardenston, and having advised the Memorials given in for the Parties, the Lords repel the Defences proponed for the Defendants (*i. e.* Appellants), and remit the Cause to the Sheriff.”

The Appellants conceiving themselves greatly aggrieved by this Interlocutor of the Court of Session, have appealed therefrom to your Lordships; and humbly hope that the same will be reversed, varied, or altered, for the following, among other

R E A S O N S.

I. The Act of 1771 neither does nor meant to extend to the Mode of Fishing exercised by the Appellants at their Dam-Dyke.—The sole Purpose of the Statute is to prevent all Fishing whatever in the River at certain Seasons when the Fish are depositing their Spawn, and to preserve the young Fry and Brood of Salmon.

The Preamble states, “That Salmon-Gilfes, Salmon-Trouts, and Whitlings, and the Spawn or Fry thereof, are frequently killed, taken, and destroyed at improper Seasons in the River Tweed, and the Rivers and Streams which run into the same, and also within the Mouth or Entrance of the said River, to the great Detriment of the Owners and Occupiers of the Fisheries, and Loss to the Public: For Remedy whereof,” the sole Objects therefore of the Act were to prevent the taking and destroying of these Fish at improper Seasons, and to improve the Fisheries for the Benefit of the Owners and Occupiers. But the Respondents endeavour so to construe this Statute as to forfeit the Appellants, who are Owners of very considerable Fisheries in this River, of their Right of Fishing altogether, by depriving them of the only possible Mode of exercising this Right, which has been used and practised beyond all Memory of Man, and is not prohibited by the Statute.

II. The applying for and passing of this Act proves, beyond a Doubt, that it was the Understanding and Opinion of all the Parties, that this River was not subject to the statutory Regulations of Fishing Salmon made by either Kingdom; and as the Respondents have, in their Pleadings, set forth, that they applied for and obtained this Act after the Judgment of the Court of Session pronounced in the other Cause in 1768, they must therefore be for ever precluded from challenging that Judgment—Besides, several of the Regulations prescribed by this Statute, particularly those respecting the Times of Fishing, are contradictory to the Scotch Statutes—The present Act therefore must be considered as the only one which regulates the Fishings in this River.

III. The Clause in this Statute, upon which the Respondents principally rely, as operating against this Dam Dyke, can neither be extended to it in Words nor by Construction. In the whole Clause, Dam-Dykes of any Kind are never mentioned—and the Clause only inflicts Penalties on such as should, after the Twelfth Day of May, 1771, use the unfair Practice of beating the Water, or place or set any white Object in the River to frighten the Fish from going up the Water.

IV. The Commencement of the Statute is the Twelfth Day of May, 1771, and it provides only against such Acts as should be done or committed from and after that Date; but the Appellants’ Dam-Dyke has stood where it now is for several hundred Years, and cannot be comprehended under, or affected by this Statute.

V. If the Legislature had meant that this Dam-Dyke should have been removed, they would have enacted it in the most clear and unambiguous Words; and as the Appellants Fishing would thereby have been lost to them, as it cannot be exercised at this Place in any other Manner, they would have been entitled to, and would certainly have received, an adequate Compensation.

AL. WEDDERBURN.
J. DUNNING.

And as it thus appears that the Claims founded on by the Respondents were neither intended by the Legislature to improve nor can it in any Justice of Property be understood to imply a Prohibition of that Trade of a thing that had been formerly used by the Applicants and their Co-defendants for the same, and which is the only Trade practicable in that Part of the River, upon the Claim of more than half a Mile long and it may be, every Constitution which the Words can bear, favour the Applicants, will fall in to support for their Reclamation of their ancient Property.

The Applicant further argued, "That it is not a general Clause of doubtful Meaning that any Person can be deprived of his Property, or the lawful Exercise of it; whereas the public Good requires this to be done; the Public a benefit by a positive Statute in the fourth and sixth *W. and M.* laws, making, at the same Time, Provision for an indemnification to the Party—That some Thing being expected in the Act which could be understood to affect the Applicant's Right of which they, and their Ancestors had been legally seized for Ages past, and their Rights protected by the Indemnity of the Court of Session in 1768, it is impossible to believe that the Applicant, who first lawfully, being a Clerk in one of the Houses of Parliament, would have permitted this Act to pass without attempting to preserve his Property."

The Department has alleged that this ACP was obtained for the special purpose of transferring the information to the ACP and to Kennedy in terms of the Report. The Department has also alleged that the ACP was obtained for the special purpose of transferring the information to the ACP and to Kennedy in terms of the Report.

[illegible]

If this Allegation is true, it requires this further Explanation : For what Reason, and upon what Account, no Information is made of this Dam-Dyke and Embankment in the A.C. itself?—That the Purpose of the Statute has been so stated by the Respondent, it would have contained an express Claim respecting this Dam-Dyke and Embankment; but as it contains nothing respecting either, nor any General Prohibition of taking up Land during the present Session, this Article is somewhat ambiguous, that whatever Persons may be now set up, this Statute was not meant or understood to affect this particular Theory, or the Mode in which it has been exercised for twenty years.

"The Court pronounced this in effect: 'Upon Report of Lord Gessner, and others, who all the statements given in for the defense, the Lords find the charges against the Defendant (A. Appellant), and remit the Court to the Bench.'

The Applicant conceiving themselves greatly aggrieved by the Inspector of the Court of Exchequer, have requested that from your Lordships; and humbly hope that the same will be received, varied, or altered, for the following reasons:



the fact that the Government has not yet decided to extend to the whole of the country the right of fishing in the rivers and lakes. The Government is not yet ready to do this. The Government is not yet ready to do this. The Government is not yet ready to do this.

The Appellants

heard at the Bar of the
Tuesday, the 10th of

HOUSE OF LORDS, on
1774.

Alexander Earl of Home, Charles
Earl of Tankerville, and others, } Appellants.
John Duke of Roxburgh, and } Respondents.
others, }

The Appellants CASE.

To be heard at the Bar of the House of Lords, on
Tuesday, the 10th of *May*, 1774.